United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1909.

No. 2056. 664

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 26, 1909.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

OCTOBER TERM, 1909.

No. 2056.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN, A CORPORATION, APPELLANT,

vs.

THE DISTRICT OF COLUMBIA.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPTEMBER 18, 1909.

In the Court of Appeals of the District of Columbia.

No. 2056.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN,
Appellant,
vs.
THE DISTRICT OF COLUMBIA.

---

a Supreme Court of the District of Columbia.

At Law. No. 50875.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN,
a Corporation, Plaintiff,
vs.
THE DISTRICT OF COLUMBIA, Defendant.

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

1 *Petition for Writ of Certiorari.*

Filed August 24, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50875.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN,
a Corporation,
vs.
THE DISTRICT OF COLUMBIA.

First. That the petitioner is a corporation under the laws of the United States and has been such corporation ever since the twenty-eighth day of March, 1806, and is a religious association having a regular and known place of worship in said District: and at the time of its incorporation and ever since said time and until the time hereinafter set forth was and has been the owner and holder of a ceme-

tery commonly known as the "Presbyterian Church Burial Ground," situate in that part of the City of Washington in said District formerly known as Georgetown.

Second. That by section One Hundred and forty-seven (147) of the Revised Statutes of the United States relating to the District of Columbia it is provided: all churches and school-houses and all buildings, grounds and property appurtenant thereto and used in connection therewith in the District, and any cemetery therein held and owned by a religious society, having a religious and known place of worship, or by any incorporated association, shall be exempt from any and all taxes or assessments, National
2 and Municipal.

Third. That as a part of said cemetery so held and owned by this petitioner as aforesaid is a lot known and described as Lot "P" of Beatty and Hawkins' addition to Georgetown, and now forming a part of Square (1273) of Washington City, formerly square (103) of Georgetown.

Fourth. That upon the tax records in the custody, control and charge of the said District of Columbia there are placed and borne upon and against the said described Lot "P" certain illegal charges or assessments in the sum of Two Hundred and Seventy-six ($276.88) Dollars and Eighty-eight cents which amount purports to be for assessments against said Lot "P" for cost of laying water mains, or water main tax, made by the Commissioners of said District under supposed authority of law: that said assessment or tax was made during the year 1895.

Fifth. That in April, 1908 this petitioner sold and conveyed to the said District of Columbia the said lot "P" together with other lots, when, upon an examination of the title to said Lot "P," it was discovered that the said named assessment against said Lot "P" was carried and borne upon the tax records of said District; and that the officials of said District contend that the said assessment or tax would have to be paid or canceled before the full purchase price could be paid on said Lot to this petitioner. That by agreement a sufficient amount of said purchase price was retained by said District officials to await the determination of the question of the legality of
3 said assessment or tax. The said District refuses to cancel said tax as in law and equity it should do, and refuses to pay to this petitioner the balance of said purchase price so retained by it, until the judicial determination of the illegality of said tax assessment. This petitioner says that the first notice or knowledge it had of the existence of said illegal tax or assessment was at the time of the negotiation of said sale as aforesaid: that it made no request for said improvement, had no notice of the order for its construction and gave no consent thereto.

Sixth. This petitioner alleges that said assessment or tax against said Lot "P" is illegal and void upon its face and should be stricken from the said tax records and not appear therein as a lien against said lot, on the following grounds:

1st. Because under the provisions of the U. S. Revised Statutes

relating to said District said Lot "P" was exempt from said charge, assessment or tax and from all assessment and taxes.

2nd. Because said petitioner never requested or authorized the laying of the said water main, and had no notice of the work to be done or of the proposed assessment until years after the same had been made.

3rd. Because the said assessment was not made or authenticated by the proper officers, as required by law.

4th. The premises considered, the petitioner prays:

1st. That the United States writ of certiorari may issue in
4 due conformity to law, directed to and commanding the respondent to certify immediately to this Court, without any change or addition thereto, copies of each and every part of the tax record in its custody relating to special improvement assessments of taxes and charges against said described Lot "P" purporting to be assessed and charged against said property by virtue of the law in force in said District in the year of 1895.

2nd. That upon the coming in of said return the said alleged tax and assessment may be held by the Court to be void and of no effect, and thereupon quashed and annulled by the judgment thereof, and the respondent directed to cancel the same upon the records in his custody.

[SEAL.] THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN,
By LEVIN S. FREY, *Secretary.*

DISTRICT OF COLUMBIA, *ss:*

I, Levin S. Frey being first duly sworn say, that I am the Secretary of the petitioner, and that I have read the above petition by said corporation subscribed and know the contents thereof, and that the facts therein stated of my own knowledge are true and the facts therein stated upon information and belief I believe to be true.

LEVIN S. FREY.

Subscribed and sworn to before me this 20th day of August A. D. 1908.

LAWRENCE O. MALLERY,
[SEAL.] *Notary Public, D. C.*

A change in amount to correct figures was made on 4 & 5
5 lines of second page before signing this paper.

L. O. MALLERY,
Notary Public.

(Endorsed.)

Let the writ issue.

WENDELL P. STAFFORD,
Justice.

Writ of Certiorari.

Issued August 24, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50875.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN, a Corporation,

vs.

THE DISTRICT OF COLUMBIA.

The President of the United States to the District of Columbia, Greeting:

You, The District of Columbia, are hereby commanded to certify to this Court, immediately, a true and accurate copy of the tax records in your custody relating to taxes and assessments against Lot "P" in Beatty and Hawkins' addition to Georgetown, now known as part of square (1273), as such taxes and assessments appear upon the tax records of said District in the year 1895, without any change or addition thereto, and which said taxes and assessments purport to be for the laying of a water-main or mains, by virtue of the
6 laws in force in said District, in the said year or the year prior thereto.

Witness The Honorable Harry M. Clabaugh, Chief Justice of said Court, this 24th day of August, A. D. 1908.

[SEAL.]

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN,
Assistant Clerk.

Marshal's Return.

Served copy of the within writ on The District of Columbia by service on Jay J. Morrow one of the Commissioners of said District of Columbia.

Aug. 24, 1908.

AULICK PALMER, *Marshal.*
H.

Return of Respondent.

Filed November 28, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50875.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN

vs.

DISTRICT OF COLUMBIA.

The return of the respondent, the District of Columbia, to the petition and writ of Certiorari issued herein, respectfully shows to the Court as follows:

7 1, 2, and 3. Respondent admits the allegation of fact set out in paragraphs one, two and three of the said petition, but disputes the matters of law set forth.

4. Respondent says that its tax records carry an assessment against the petitioner in the sum of one hundred and seventy-six dollars and eighty-eight cents ($176.88) for water-main tax as alleged, which arose from the laying of a water-main in 34th street in December, 1894.

5. Respondent admits the sale of the said property to it as alleged, but denies that the said assessment was "discovered" at that time; on the contrary respondent says that the said assessment was levied on the said property on the 2d day of January 1895, and notice thereof was duly served on the officers of the petitioner on the 12th day of January, 1895; that the said petitioner then had notice, and the respondent has ever since contended, that the said assessment was and is just and legal and that its payment would be enforced; that the legality of the said assessment was never disputed until after the time of the said sale when a certified check for the amount of the said assessment was put into the hands of the Auditor of the respondent to await a determination of the question of such legality; that it was the understanding of the parties to the said sale that a good title was to be conveyed to the respondent, clear of all liens, taxes and assessments and that the price paid by the respondent was not to be enhanced to it by its assumption of any such liens, taxes or assessments, but that the price paid should be clear of any such lien, and while it was not put in formal shape, that the determination of the
8 legality of said assessment should be left to the respondent through its Commissioners, and the said Commissioners have refused to cancel such assessments.

Respondent says it does not know whether the petitioner had notice of the order for the construction of the said water-main or whether it gave its consent thereto, as the records pertaining to the said water-main, prior to the time of the said assessment have all been lost.

6. Respondent avers that the said assessment was and is a valid and legal assessment.

1st. That in the year 1887 the Commissioners of the District of Columbia passed an order forbidding further interments of human bodies in the cemetery of the petitioner, and respondent believes and avers that said order was passed at the solicitation of the petitioner; that after the date of the said order no further interments were made in the said cemetery; that the petitioner thereafter advertised in the "Washington Post" and the "Evening Star" newspapers published in the District of Columbia, for a period of about six months, as respondent is informed and believes, notifying all persons having friends and relatives buried in the said cemetery to remove the said bodies because the said cemetery had been abandoned for burial purposes; that the said cemetery was abandoned as a burial ground and a large number of the bodies therein were shortly thereafter removed, to wit, about four hundred of the same, and that the said property became and was for sale, and that the said petitioner had offers of

purchase for the said ground which were refused solely for
9 inadequacy of the price offered; that said property was then left unfenced; that thereafter in December, 1894, the Commissioners of the District of Columbia ordered the said water-mains to be laid and the same were laid in the said month; that in January, 1895, assessments for the said water-mains were levied against the said property and notice thereof served on the petitioner; that in April, 1908, the said property was sold to the District of Columbia, and the remainder of the bodies in the said cemetery were removed therefrom, and the said lot "P" is now a public playground.

Further respondent says that while negotiations were pending for the sale of the said Lot "P" and other property to the respondent for the purposes of a public playground, the respondent hesitated to purchase the said property for fear there might and would be difficulty about the removal of the bodies therefrom, under Section 675 of the Code of Law for the District of Columbia; but the said petitioner insisted that the said property was no longer a legal cemetery and had not been for many years prior to the passage of the Code, to wit, from the time of the Commissioners' order of 1887 and the removal of the four hundred bodies shortly thereafter; and the said petitioner exhibited to the respondent the said order of 1887 and affidavits of various persons and copies of the advertisement in the "Washington Post," above referred to, which affidavits and copies of advertisements were subsequently taken away by the agents of the petitioner,
to substantiate its claim that the said property was not and
10 had not been a cemetery since the time mentioned; that the status of the said alleged cemetery had not changed between the time of the said order and removal of the bodies, as stated, in the year 1887, and the time of the said negotiations with the respondent for the sale of the same; and that relying upon these representations of the petitioner, the respondent purchased the said property.

Further respondent says that before any application was made to cancel the said assessments, the petitioner had parted with its title to the said property, and that it is not now, and was not at the time of the filing of the petition herein, entitled to complain of the alleged illegality of the said assessments.

2d. Respondent does not know whether petitioner requested the said work of laying the said water-main or had notice of the work to be done, as before stated, but respondent repeats that notice of the said assessment was given to the petitioner in January, 1895.

3d. Respondent denies that the said assessments were not authenticated by the proper officers, or that such authentication was necessary under the laws in force at the time the said assessments were made.

7. Respondent appends hereto as a part of this return:

(1) The Commissioners' order of 1887.

(2) Order for the laying of the water-main in question.

(3) Copies of the notice of assessments of January 2, 1895.

11 (4) Copies of the returns of service of the said notices.

(5) Copy of the assessment sheet relating to the said assessment.

(6) Copy of the Watermain Card-Index relating to the same.
(7) Copy of the Commissioners' order accepting the proposal to sell the said ground.

THE DISTRICT OF COLUMBIA,
By HENRY B. F. MACFARLAND,
HENRY L. WEST,
JAY J. MORROW,
Its Commissioners.

E. H. THOMAS,
F. H. S.,
Att'y for Respondent.

DISTRICT OF COLUMBIA, *ss:*

Henry B. F. Marfarland, being first duly sworn, on oath says that he is President of the Board of Commissioners of the District of Columbia, whose foregoing return he has signed as such, that the facts therein stated are true to the best of his official information and belief.

HENRY B. F. MACFARLAND.

Subscribed and sworn to before me this thirteenth day of November, A. D. 1908.

WILLIAM TINDALL,
[SEAL.] *Notary Public, D. C.*

12 Commissioners of the District of Columbia,
Executive Department.

WASHINGTON, *April* 8, 1887.

Ordered:

The Health Officer of the District is hereby instructed to refuse to issue any permit for interments in the Cemetery known as the "Presbyterian" located in the square bounded by 33d, 34th Q and R streets, N. W., in Georgetown, D. C., and the Cemetery known as the "Lutheran," located at the northeast corner of 32d and Q streets in Georgetown.

Official copy furnished.
By order:

W. TINDALL,
Secretary.

13 Executive Office,
Commissioners of the District of Columbia.

WASHINGTON, *December 3rd*, 1894.

(Copy.)

Ordered:

That a water main be laid in 34th Street between Q and R streets; estimated cost $515.88 (8555, 1894).

(Signed) JOHN W. ROSS,
GEO. TRUESDELL,
Commissioners of the District of Columbia.

14 Georgetown.

Return this Notice to Water Department and get Tax Bill to be Paid to the Collector of Taxes of the District of Columbia.

Engineer Department,
Water Office,
District of Columbia.

No. —. WASHINGTON, *January 2nd,* 1895.

Mr. Presbyterian Church Burial Grounds:

You are hereby notified that in accordance with the acts approved June 23, 1873, June 10, 1879, and June 17, 1890, and August 11, 1894, a Water Main was laid on 34th Street between Q and R Streets, on Dec. 21, 1894, and that Water Main tax has been assessed upon the following property, Being lot P, Being the 50 feet in excess of 100 feet deep, Square 103, measuring Fifty (50) front feet, at one dollar and twenty-five cents per linear foot. Payment of this tax can be made in four equal instalments, the first of which is payable on or before the 2nd day of February 1895 without interest; and the remaining instalments on the 2nd day of Jan. in each succeeding year, with interest at ten per cent. per annum from Jan. 2nd, 1895.

** If the first instalment of the above be not paid within the time specified, the property will be advertised and sold by the Collector of Taxes at the succeeding tax sale.

15 The whole amount of said tax may be paid in full on or before the 2nd day of February, 1895 in which case an abatement of six per cent. will be made.

Total Tax	$62.50
Discount	$ 3.75
Amount required	$58.75

(Signed) JOHN J. BEALL,
Chief Clerk Water Department.

Recorded in Ledger.
Vol. 17.
Folio —.

Delivered Jan. 12, 1895.
By: (Signed) J. B. FITZHUGH,
Inspector.

I certify that the foregoing is a true copy of the notice of water main assessment against lot P, square 103.

——— ———,
Assessor, D. C.

16 Office of the Commissioners, District of Columbia.
Water Department.

Return of Service of Notice.

I hereby certify, That the annexed notice is a copy of the original notice of assessment against Lot No. P, being the 50 feet in excess of 100′, Square No. 103, Gtn. assessed in the name of Presbyterian Church Burial Grounds, for laying water main on 34th between Q & R Streets and that said original notice was served by me on the 12th day of January, 1895, in the following manner: by hand to Chas. Becker, Treasurer of West Street Presbyterian Church at No. 1239 32nd Street, N. W.

(Signed) J. B. FITZHUGH,
Inspector.

[SEAL.] Sworn to and Subscribed, before me this 14th day of January, 1896.

(Signed) WM. OSCAR ROOME,
Notary Public.

I certify that the above is a true copy of the return of service notice in the case of lot P, square 103.

——— ———,
Assessor, D. C.

Sworn to and subscribed, before me this — day of ———, 190–.

——— ———,
Notary Public.

17 Georgetown.

Return this Notice to Water Department and get Tax Bill to be Paid to the Collector of Taxes of the District of Columbia.

Engineer Department,
Water Office,
District of Columbia.

No. —. WASHINGTON, *January 2nd,* 1895.

Mr. Presbyterian Church Burial Grounds:

You are hereby notified that in accordance with the acts approved June 23, 1873, June 10, 1879, June 17, 1890, and August 11, 1894, a Water Main was laid on 34th Street between Q & R Streets on Dec. 21st, 1894 and that a Water Main Tax has been assessed upon the following property, Being lot P, Square 103, measuring Ninety-one & fifty hundredths (91.50′) front feet, at One Dollar and twenty-five cents per linear foot. Payment of this tax can be made in four equal annual instalments, the first of which is payable on or before the 2nd day of Feb., 1895, without interest; and the remaining instalments on

the 2nd day of Jan. in each succeeding year, with interest at ten per cent. per annum from Jan. 2, 1895.

*** If the first instalment of the above be not paid within the time specified, the property will be advertised and sold by the Collector of Taxes at the succeeding tax sale.

18 The whole amount of said tax may be paid in full on or before the 2nd day of February, 1895 in which case an abatement of six per cent. will be made.

Total Tax	$114.38
Discount	$ 6.86
Amount required	$107.52

Recorded in ledger.
Vol. 17.
Folio ——.

(Signed) JNO. J. BEALL,
Chief Clerk Water Department.

Delivered Jan. 12, 1895.
By: (Signed) J. B. FITZHUGH,
Inspector.

I certify that the foregoing is a true copy of the notice of water main assessment against lot P, square 103.

——— ———,
Assessor, D. C.

19 Office of the Commissioners, District of Columbia.

Water Department.

Return of Service of Notice.

I hereby certify, That the annexed notice is a copy of the original notice of assessment against Lot No. P, Square No. 103, Gtn. assessed in the name of Presbyterian Church Burial Grounds, for laying water main on 34th between Q & R Streets and that said original notice was served by me on the 12th day of January, 1895, in the following manner: by hand to Chas. Becker, Treasurer of West Street Presbyterian Church at No. 1239 32nd Street, N. W.

(Signed) J. B. FITZHUGH,
Inspector.

[SEAL.] Sworn to and Subscribed, before me this 14th day of January, 1895.

(Signed) WM. OSCAR ROOME,
Notary Public.

I certify that the above is a true copy of the return of service notice in the case of lot P, square 103.

——— ———,
Assessor, D. C.

Sworn to and subscribed, before me this — day of ——, 190–.

——— ———,
Notary Public.

20 Water Main Assessments.

List of Property Fronting on 34th Street, Between Q and R Streets, Georgetown.

Lot.	Front ft.	Owners.	Amount.	Amount previously assessed.	Remarks.
103 P	91.50	Presbyterian Church Burial Grounds....	114.38	17/417	
P	50.	do.	62.50	"	
Of 193	S34.50	Charles A. Offutt.....	43.13	"	
" 193	N40.50	Marian Clements.....	50.63	"	
" 194	15	Peter J. Clark	18.75	"	
" 194	25.	Marian Clements.....	31.25	"	
104 12	50	Louis Mackall, Jr.....	62.50	"	
13	50	do.	62.50	"	Nov. 28, 1894.
			$445.64		

Amount of assessment = $445.64

F. W. C. (Signed) JNO. J. BEALL,
Chief Clerk Water Dep't.

I certify that the above is a true copy of the assessment sheet pertaining to the laying of a water main in 34th Street between Q & R Streets, Georgetown.

WM. P. RICHARDS,
Assessor, D. C.

21 Water Main Tax.

Square 1273, Lot P. Description —.

Assessed January 2, 1895. Ledger 20 18. Folio 41 88.

Square Ft.....	1.	$28.59	Paid
	2.	$28.60	"
Front " 91.50′ on Q Street.....	3.	$28.59	"
	4.	$28.60	"
Total.....		$114.38	

Remarks: Presbyterian Church Burial Ground.
Cancelled .....
Assessed .....(See next card.)
Assessed for Excess 50 feet on 34th Street.....(" " ")

It is hereby certified that the foregoing is a true and correct copy of the record affecting the water main assessment against lot P, square 1273, as shown by the Water-main Card Index of this office.

WM. P. RICHARDS,
Assessor, D. C.

22 Water Main Tax.

Square 1273, Lot P. Description —.

Assessed January 2nd, 1895. Ledger 20 18. Folio 41 88.

Square Ft.....	1.	$15.63	Paid
	2.	$15.62	"
Front " 50′ Excess on 34th Street.	3.	$15.63	"
	4.	$15.62	"
Total.....		$62.50	

Remarks: Presbyterian Church Burial Grounds.

It is hereby certified that the foregoing is a true and correct copy of the record affecting the water main assessment against lot P, square 1273, as shown by the Water-main Card Index of this office.

WM. P. RICHARDS,
Assessor, D. C.

23 Commissioners of the District of Columbia,
Executive Department.

WASHINGTON, *June* 21, 1907.

E. D. 51648-31.
A. O. 27440.
L. S. 161024 C. O.

Ordered:

That the proposal of Ellen W. Mallery to sell to the District of Columbia as a site for a playground the ground in square 1273 known as the Presbyterian Church burial ground, and also including lots P, 192, 191, 190, 189, part of 198, 197, part of 196, part of 193, and part of 195, as more fully indicated within green lines on the plat contained in Engineer Department file # 51648-31, and containing 82571 square feet, more or less, for the sum of $27,868.25, is hereby accepted, under the following conditions:

That this offer is for the whole of said property and not for any part thereof.

That a good title to the whole of this property, satisfactory to the Commissioners of the District of Columbia, shall be furnished without cost to said District.

That within thirty days from the date of this order said Mallery shall submit to the District Commissioners satisfactory evidence that *he* is legally authorized to disinter and remove the bodies in said

cemetery, and to provide for their reinterment, should such action be necessary.

The cost of said site to be chargeable to the appropriation for the purchase of playground sites, 1908.

Official copy furnished the Engineer Department.

By order:

W. TINDALL,
Secretary.

24 *Motion for Judgment.*

Filed December 8, 1908.

In the Supreme Court of the District of Columbia.

At Law. No. 50875.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN
vs.
DISTRICT OF COLUMBIA.

And now comes the plaintiff and moves for judgment, notwithstanding the return of the respondent filed herein.

PADGETT & COOMBE,
Att'ys for Plaintiff.

Suggestions of the Court.

Filed March 8, 1909.

In the Supreme Court of the District of Columbia.

No. 50875. At Law.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN, a Corporation,
vs.
THE DISTRICT OF COLUMBIA, Respondent.

This is certiorari for the cancellation of a tax or assessment upon a lot in Georgetown which the petitioner maintains is illegal. The assessment was made by the District authorities and the lot
25 against which it was made was or had been a cemetery. The respondent claims it had ceased to be a cemetery at the time the assessment was made. If it was still a cemetery the assessment would appear to be illegal under the section 147 of the Revised Statutes of the United States relating to the District of Columbia, which provides, among other things, that "Any cemetery in the District held and owned by a religious society having a religious and known place of worship or by any incorporated association shall be exempt from any and all taxes or assessments, national and municipal." In

April, 1908, the petitioner sold and conveyed the lot in question to the respondent, the District of Columbia, for a price agreed, but when the District came to pay the purchase price it insisted upon deducting therefrom the amount of said assessment. The petition alleges that thereupon it was agreed between the petitioner and the respondent that a sufficient amount of said purchase price should be retained by the respondent to await the determination of the question of the legality of the assessment; that the District refuses to cancel the assessment and refuses to pay the petitioner the balance of the price until it shall have been judicially determined that the assessment is illegal. Upon this point the answer of the respondent states that after the sale a certified check for the amount of the assessment was put into the hands of the auditor of the respondent to await the determination of the question of legality. That it was the understanding of the parties to the sale that a good title was to be conveyed to the respondent clear of all liens, taxes and assessments and that the price paid by the respondent was not to be enhanced to it by
26 its assumption of such liens, taxes or assessments, and that the determination of the legality of said assessment should be left to the respondent through its commissioners and that said commissioners have refused to cancel it. The respondent also insists that the petitioner has no right to the writ of certiorari because it had parted with its title to the property against which the assessment stands before filing the petition herein.

The question presented to the court arises upon the sufficiency of the answer.

It seems to the court that the petitioner has mistaken its remedy and that it should bring an action at law against the District for the unpaid balance of the purchase price. If the tax is illegal the District will have no right to retain such balance. The court understands that the writ of certiorari does not issue, ordinarily, where another adequate remedy exists, but inasmuch as this point was not argued the foregoing view is offered at this time only as a suggestion and as an intimation of the court's present opinion. Before disposing of the case the court will be glad to receive the suggestions of the counsel upon each side, upon this point.

WENDELL P. STAFFORD, *Justice.*

27 *Opinion.*

Filed June 18, 1909.

In the Supreme Court of the District of Columbia.

No. 50875. At Law.

TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN
vs.
THE DISTRICT OF COLUMBIA.

The petitioner sold and conveyed to the District of Columbia a parcel of land formerly used as a cemetery. When the District came

to pay the purchase price it withheld a portion thereof as and for the amount necessary to extinguish a tax formerly levied against the parcel by the District. The petitioner objected to the deduction on the ground that the parcel was a cemetery and was not subject to taxation. The District, however, insisting upon its position, the petitioner prayed and obtained a writ of certiorari to have the tax declared illegal. The District has now made its return to the writ and the petitioner has moved for judgment notwithstanding the return.

The motion must be denied. The writ was improperly issued and must be dismissed. There was and is no need for the same. The petitioner has only to sue the District at law for that part of the purchase price retained by it in order to have the whole question determined. If the petitioner is right that the tax is illegal the District can not resist judgment for the unpaid portion of the pur-
28 chase money. Certiorari does not lie except for want of other remedy. Judgment accordingly.

WENDELL P. STAFFORD, *Justice.*

Supreme Court of the District of Columbia.

FRIDAY, *June* 18, 1909.

Session resumed pursuant to adjournment, Mr. Justice Stafford presiding.

* * * * * * *

At. Law. No. 50875.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN,
Pl't'f,
vs.
THE DISTRICT OF COLUMBIA, Def't.

Upon consideration of the petitioner's motion filed herein for judgment, notwithstanding the return of the Respondent filed herein, it is ordered that said motion be, and it is hereby overruled.

Further it is ordered that the writ of Certiorari issued herein be, and the same is hereby quashed and for nothing held at the costs of the petitioner.

The petitioner in open Court notes an appeal to the Court of Appeals of the District of Columbia, and upon motion the penalty of the bond for costs on said appeal is hereby fixed in the sum of one hundred dollars ($100).

29 *Memorandum.*

July 12, 1909.—Appeal bond approved and filed.

30 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 29, both inclusive, to be a true and correct transcript of the record, as per Rule 5 of the Court of Appeals of the District of Columbia, in cause No. 50875, at Law, wherein The Trustees of the Presbyterian Church of Georgetown, a Corporation, is plaintiff, and The District of Columbia, is defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington, in said District, this 23rd day of August, A. D. 1909.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG, *Clerk,*
By ALF G. BUHRMAN,
Ass't Cl'k.

Endorsed on cover: District of Columbia Supreme Court. No. 2056. The Trustees of the Presbyterian Church of Georgetown, appellant, vs. The District of Columbia. Court of Appeals, District of Columbia. Filed Aug. 26, 1909. Henry W. Hodges, clerk.

IN THE Henry W. Hodges, Clerk.

Court of Appeals
of the District of Columbia

OCTOBER TERM, 1909.

No. 2056.

THE TRUSTREES OF
THE PRESBYTERIAN CHURCH OF GEORGETOWN
Appellant.

vs.

THE DISTRICT OF COLUMBIA
Appellee.

BRIEF FOR APPELLANT.

JAS. E. PADGETT,
Attorney for Appellant.

Hayworth Pub. House, Wash D C

IN THE

Court of Appeals of the District of Columbia

OCTOBER TERM, 1909.

No. 2056.

THE TRUSTEES OF
THE PRESBYTERIAN CHURCH OF GEORGETOWN.
Appellant.
vs.
THE DISTRICT OF COLUMBIA, *Appellee.*

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

This is an appeal from the judgment of the lower court, overruling the appellant's motion for judgment on the return to the writ of certiorari, and quashing said writ.

The petition alleges, that in 1806 the appellant was duly incorporated as a religious association and has a known place of worship in said District; that ever since said time and up to the date of the sale thereafter referred to it was the owner and holder of a cemetery known as the "Presbyterian Church Burial Ground," situate in said District; that by Section 147 of the U. S. Revised Statutes relating to said District it is provided: "all churches and school houses and all buildings, grounds and property appurtenant thereto and used in connection therewith in the District, and any cemetery therein held and owned by a religious society, having a religious and known place of worship, or by any incorporated association, shall be exempt from any and all taxes and assessments, national and municipal;" that as part of said cemetery is a lot

known as Lot P; that upon the tax records of said District there are placed and borne against said lot P certain illegal charges and assessments in the sum of $176.88, which amount purports to be for assessment for cost of laying water mains made in 1895; that in April, 1908, the appellant sold to said District said lot P, when, upon an examination of the title thereto, it was discovered that said assessment was borne upon the tax records, and that the officials of said District contended that said assessment would have to be paid or canceled before the full purchase price could be paid for said lot; that by agreement a sufficient amount of said purchase price was retained by said officials to await the determination of the legality of said assessment; that said District refuses to cancel said tax or to pay the appellant the balance of said purchase price so retained by it until the judicial determination of the illegality of said tax; that the first notice or knowledge it had of said illegal assessment was at the time of the negotiation of said sale; that it made no request for said improvement, had no notice of the order for its construction, and gave no consent thereto; alleges that said assessment is illegal and should be stricken from said tax records, and not appear as a lien against said lot, because under said provision of the Revised Statutes said lot was exempt from said assessment and tax; the appellant had no notice of the assessment, and the assessment was not made by the proper officer. The petition prays for the writ of certiorari and the quashal of the assessment.

The writ was issued and a return made thereto. In the return the appellee admits that the appellant is a duly incorporated association as alleged and that it was the owner of a cemetery of which lot P forms a part, as alleged, and that its tax records carry an assessment against said lot in the sum of $176.88 for the laying of a water main in 1894; admits the sale of the property as alleged and alleges that the assessment was levied on January 2, 1895, and officers of the appellant notified January 12, 1895; that then and ever since said date the appellee has contended that the assessment was legal and that its payment would be enforced; that its legality was never

disputed until after the time of said sale, when a certified check for the amount of the assessment was put into the hands of the District Auditor to await a determination of the question of the legality of the assessment; that it was the understanding of the parties that a good title was to be conveyed, clear of all liens, taxes and assessments and that the price paid by appellee was not to be enhanced by its assumption of any such liens or assessment; avers that said assessment was and is a legal assessment; that in 1897 the appellee passed an order forbidding further interments in said cemetery, and thereafter the appellant by advertisement notified persons having relatives and friends buried in said cemetery to remove same, and about four hundred bodies were removed, and the property became for sale, and appellant had offers of purchase for said ground which was refused for inadequacy of price; property then left unfenced; that thereafter in 1894 the water main was laid, and in January, 1895, the assessment was levied; that in April, 1908, the lot was sold to the appellee and the remainder of the bodies removed therefrom. That while negotiations for said sale were pending the appellee hestitated to purchase the lot for fear that there might be difficulties about the removal of the bodies therefrom under Section 675 of the D. C. Code; that appellant insisted that said property was no longer a legal cemetery and had not been since the appellee's order of 1887 and the removal of the 400 bodies therefrom; that the appellant has parted with its title to said property, and is not now and was not at the time of filing its petition entitled to complain of the alleged illegality of the assessment.

The appellee files with its return as exhibits and part thereof copies of the assessment, of notices of the same alleged to have been given the appellant, of the appellee's order prohibiting the further interment in said cemetery, and of the acceptance of the offer of appellant's agent to sell the property in which it is provided, that said agent shall within thirty days submit to the appellee satisfactory evidence that said agent is authorized to disinter and remove the dead bodies from said cemetery.

Upon consideration of the motion for judgment upon the return the justice sitting denied the same for the reason that "the petitioner has only to sue the District at law for that part of the purchase price retained by it in order to have the whole question determined."

ASSIGNMENTS OF ERRORS.

1. The court erred in not granting the motion to quash the assessment and in dismissing the petition.

2. The court erred in holding that the appellant is not entitled to the remedy, by writ of certiorari, to have the assessment canceled.

ARGUMENT.

A consideration of these assignments of error involves the questions:

First: Was the lot in question a part of a cemetery at the date of the assessment?

The appellant alleges that said lot was part of a cemetery at the time of said assessment; and the appellee admits that at the date of the negotiation for sale there were bodies of the dead remaining in said lot, and asserts that "the respondent hesitated to purchase said property for fear there might and would be difficulty about the removal of the bodies therefrom;" and in the agreement for sale the appellee required the appellant's agent to submit satisfactory evidence that she "is legally authorized to disinter and remove the bodies in said cemetery." So there can be no question that there were bodies of the dead remaining in said lot which had been buried there prior to 1887. But the appellee claims that the lot at the time of the assessment was not a cemetery because: the appellee in 1887 had instructed its health officer "to refuse to issue any permit for interments in the cemetery known as the Presbyterian," and thereafter no further interments were made; and the appellant published a notice to all persons having friends buried there to remove their bodies; and that the cemetery had been abandoned for burial purposes;

and a number of bodies had been removed; and that the lot became for sale and unfenced.

Did these acts constitute an abandonment and cause the lot to cease to be a cemetery?

"Abandonment includes both the *intention* to abandon and the external *act* by which the intention is carried into effect."

1st Cyc. 4.

"A cemetery is none the less a graveyard because further interments in it become impossible; it only loses its character as a resting place of the dead when those already interred are exhumed and removed." 6 Cyc. 715.

Stockton v. Newark, 42 N. J. Eq. 531.

Com. vs. Wellington, 7 Allen (Mass.) 299.

The mere passing of a city ordinance prohibiting future burials in a graveyard does not constitute abandonment thereof.

Kansas City v. Scarritt, 169 Mo. 471.

In the leading case of Campbell vs. City of Kansas, (102 Mo. 326, 10 L. R. A. 593), the court says: "To constitute abandonment of a graveyard, it is not sufficient that burials therein have ceased or been prohibited. So long as it is kept and preserved as a resting place for the dead, with anything to indicate the existence of graves, or so long as it is known or recognized by the public as a graveyard it is not abandoned."

In Young v. Board of Commissioners, (51 Fed. Rep. 585), the court says: "The removal from the lot in 1865, 1866, 1867, and 1868 of the remains of many buried there by their friends did not constitute an abandonment. The lot did not lose its distinctive character as a burial ground, nor did the neglect to keep the ground properly fenced, nor the digging and hauling of gravel from its surface have that effect. But when on December 22nd, 1868, the council of the city of Youngstown passed an ordinance prohibiting further interments, and ordering the removal of the remains of those buried there, *and the the removals were accordingly made,* this was a lawful abandonment of the lots as a cemetery."

Second. Was the assessment illegal, void and made contrary to law and without jurisdiction in the District officials, and did the appellee have any notice of the same? The assessment itself recites that it is made against the "Presbyterian Church Burial Grounds." At the time this assessment was made, Sec. 147 of the U. S. Revised Statutes relating to said District was in force. It provides: "All churches and school houses, and all buildings, grounds and property appurtenant thereto, and used in connection therewith in the District, and any cemetery therein, held and owned by a religious society, having a regular and known place of worship, or by any incorporated association, shall be exempt from any and all taxes or assessments, national or municipal."

In the case of the District of Columbia vs. Sisters of Visitation, 15 App. D. C. 300, this court held that the above section applies to and includes special assessments; that such assessments are illegal and void; and that the District officials had no jurisdiction to make such assessments, and that the same should be canceled.

Mackall vs. Ches. & O. Canal Co., 94 U. S. 308.

The assessment was also void because it was not made in the name of the appellant. The assessment list describes the owner of the lot as the "Presbyterian Church Burial Grounds." Now this is not the name of the appellant which was the owner of the lot, and which was entitled to have the assessment made to it in its true name; and this not having been done, the assessment is void.

Washington v. Pratt, 8 Wheat 681.

The appellant alleges that no notice of the assessment was given it; the appellee alleges that notice was given, and to sustain its allegation exhibits a true copy of the notice alleged to have served on the appellant. This notice is addressed: "Mr. Presbyterian Church Burial Grounds." The legal corporate name of the appellant is "The Trustees of the Presbyteian Church of Georgetown." Now we submit that a notice to "Mr. Presbyterian Church Burial Grounds" is not a legal or sufficient notice to the appellant.

The appellant was entitled to notice of the appellee's assessment of the property for special improvements.

District of Columbia v. Burgdorf, 6 App. D. C. 465.
District of Columbia v. Wormley, 15 App. D. C. 58.

And such notice must give the correct name of the owner of the property. "Ida J. Hawthorn is not equivalent to Ida J. Hanthorn."

Marx v. Hanthorn, 148 U. S. 172.

And because the required notice was not given to the appellant, the assessment is void.

Bensinger v. D. C. 6 Mack. 285.

Third. Had the appellant, having conveyed the lot to the appellee, the right to the writ of certiorari?

The writ will lie at the instance of one who declares himself aggrieved, because specifically and injuriously affected, and who was a party or substantially a party to the proceedings below.

6 Cyc. 767.

After the allowance of the writ the right to it will be presumed in the absence of proof to the contrary.

6 Cyc. 767, *note*.

The appellant was the owner of the property assessed. The object in reciting in the petition that the appellant had sold the lot to the appellee, which contended that the said assessment would have to be canceled before the full purchase price would be paid to the appellant; that an agreement was made whereby the appellee should hold a sum sufficient to cover the assessment until the question of the legality of the assessment should be judiciously determined, was solely for the purpose of showing the appellant's interest in the question of the validity of the assessment. It was bound to convey a title free of all liens, taxes and assessments, and for the purpose of having the title freed from the same, and the

appellant, in contemplation of law, is to the extent of said assessment interested in the real estate. It has a direct interest in this question. It was not called upon to pay off any lien that might appear against the property, whether valid or not; and it was its right as well as duty when an illegal lien appeared to appeal to the courts to relieve the property from such lien. The appellant, under the facts in this case, has the same right to seek the aid of the court in having the assessment canceled, as it would have had had it delayed conveying the property until the assessment had been cancelled, and the appellee would not be more or less benefited by either proceeding. The appellee wants a clear title and the appellant desires to give a clear title, and the appellee's position in this case can be explained only on the theory that it not only wants a clear title but also wants money paid to it upon a void and illegal assessment—money that it has no more right to than the merest stranger.

Yet it is claiming that the appellant has no right to question the validity of the assessment. The appellee says it is valid and therefore, it is valid. An assumption of power which the courts would not construe even the law-makers to assume. In the case of Great Falls Ice Co. v. D. C. (19 D. C. Rep. 327), the court held that although special assessments made under an act of the Legislative Assembly were ratified under an act of Congress and thereby given validity, yet Congress never intended by its act to give validity to everything called an assessment under the Legislative act when the so-called assessment has no element vital to its integrity. Now, in the case at bar, the appellee is insisting that the assessment is valid, notwithstanding that Congress expressly prohibited it being made.

Fourth. Has the appellant mistaken its remedy—in other words, is it entitled to the writ of certiorari to have the assessment canceled?

The petition alleges that the assessment is void, and should be stricken from the tax records, and the prayer is that the

assessment may be declared to be void and of no effect, and the appellee directed to cancel the same upon its records. No other relief is prayed for—not the return of the petitioner's money—nor the directing the appellee to carry out its alleged agreement with the petitioner—nor anything other than the cancellation of the assessment. The appellant is under obligations to the appellee to have this done.

In the case of Wood v. D. C. (6 Mack. 142), the question of the validity of special assessments were raised by forty-three writs of certiorari. Judge Hagner in delivering the opinion of the court said: "It is insisted that certiorari is not the proper form of remedy to be invoked by the peitioners, we are of opinion that this objection cannot be maintained." (See brief of petitioners in this case for the numerous authorities on this point).

In the case of Ewing v. St. Louis (5 Wall 413), where a bill in equity was filed to enjoin the collection of an assessment, the court said: "With proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the invalidity consists in matters to be established by extrinsic evidence. *In other cases the review and correction of the proceedings must be obtained by the writ of certiorari.*"

In the case of D. C. v. Burgdorf, (6 App. D. C. 465) the court says:

"The writ of certiorari, when issued in a case like the present, is somewhat in the nature of a writ of error, though it is not a writ of right, but rests in the discretion of the court applied to for its assistance. Yet after the writ has been granted and the record certified in obedience to it, the question arising upon that record must be determined according to the fixed rules of law (Harris v. Barber, 129 U. S. 366)." "The writ lies * * * where it is plainly alleged and verified by affidavit, that there is a material defect of jurisdiction in the

proceedings of the special or inferior tribunal; for the object of requiring the record to be brought into the superior court is to determine whether such inferior or special tribunal had jurisdiction, or had exceeded its jurisdiction or had not proceeded according to the essential requirements of the law." "Within these limits the writ has been held allowable by many cases to correct illegalities in the levy of taxes and local assessments by assessors, commissioners or other officers entrusted with the execution of such duty.". And in this case the special assessment was quashed.

In the following cases writs of certiorari were issued, special assessments for improvements were quashed and ordered to be canceled:

Allman v. D. C. 3 App. D. C. 8.
Jones v. D. C. 3 App. D. C. 26.
Keyser v. D. C. 3 App. D. C. 31.
D. C. v. Weaver 6 App. D. C. 482.
Bates v. D. C. 18 D. C. Rep. 76.
Danenhower v. D. C. 18 D. C. Rep. 99.
Johnson v. D. C. 6 Mack. 21.
Walker v. D. C. 6 Mack. 353.

In view of the foregoing citations and quotations it can hardly be contended that the appellant is not entitled to its remedy by certiorari. We submit that the only question before the court is, was the assessment void? If so, it is unnecessary for the court to consider any other question raised on the record.

Keyser v. D. C. 3 App. D. C. 31.
Barber v. Harris, 6 Mack. 586.

The lower court says that appellant's remedy is to sue for the retained purchase money and in such suit the question of the legality of the assessment could be determined. But there are two objections to this course: First, any judgment given would not remove the assessment from the tax records, as the appellant is bound under its contract of sale to have done; and, secondly, under the agreement by which the ap-

pellee retains the money in escrow, before the appellant is entitled to receive the same, it must first obtain a judicial determination of the invalidity of the assessment, and the failure to obtain such determination could be successfully pleaded in bar of any suit to recover the money.

We respectfully submit that the appellant is entitled to have the assessment quashed in this proceeding.

JAS. E. PADGETT,

Attorney for Appellant.

Court of Appeals, District of Columbia.

OCTOBER TERM, 1909.

No. 2056.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN, APPELLANT,

v.

THE DISTRICT OF COLUMBIA.

BRIEF FOR RESPONDENT.

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Court of Appeals, District of Columbia.

No. 2056.

THE TRUSTEES OF THE PRESBYTERIAN CHURCH OF GEORGETOWN, APPELLANT,

v.

THE DISTRICT OF COLUMBIA.

STATEMENT OF THE CASE.

This was a petition for a writ of certiorari, in form, to require the Commissioners of the District of Columbia to cancel an assessment of $276.88, made in 1895, against lot "P," in square 103, of Georgetown, now square 1273, owned by the petitioner, for the laying of a water main; that said lot is and was part of a cemetery, and was exempt from such assessment; that in 1908 the said lot was sold to the District of Columbia, with other lots, and by agreement a sufficient amount out of the purchase-money was withheld by the District to await the determination of the question of the legality of the said tax, the officials of the District refusing to pay the full price until the said assessment was paid or quashed; that the District refuses to cancel the said tax; that the petitioner had no notice of the said assessment until the negotiation of the said sale; that it made no request for the said

water main, and had no notice of the order for its construction.

The District replied to the petition that it had on its records an asessment of $176.88 for water-main tax, as alleged, which arose from a water main laid in 34th street, December, 1894; that the said assessment was made on the 2d day of January, 1895, and that notice thereof was served on the officers of the petitioner on the 12th of January, 1895; that the legality of the said assessment was never disputed until the time of the sale of the said property to the District; that it was the understanding of the parties that a good title was to be conveyed to the respondent clear of any liens or taxes, and the determination of such legality was to be left to the Commissioners; that in 1887 the Commissioners of the District passed an order, at the solicitation of the petitioner, forbidding further interment in the said cemetery, and no interments were made therein after said date; that the petitioner advertised in the "Washington Post" and the "Evening Star" for a period of about six months, notifying all persons who had friends or relatives buried in the cemetery to remove the said bodies, because the said cemetery had been abandoned for burial purposes, and that about four hundred bodies were thereafter removed; that the said property was then placed on the market for sale, and that several offers to purchase were refused solely for the inadequacy of price; that said property was left unfenced; that the property was sold to the District in April, 1908, the remainder of the bodies removed, and the property became and is now a public playground; that while the negotiations were pending for the purchase by the respondent of the said property, it hesitated to purchase for fear that the said cemetery had not been abandoned, and that there might be some difficulty about the removal of the bodies still remaining there, but the petitioners insisted that the said property was no longer a cemetery, and had not been for many years prior to the adoption of the Code, to wit, since the Commissioners' order

of 1887; that no change had taken place in the status of the said cemetery; that the said order, copies of the advertisements and affidavits of various persons were exhibited to the Commissioners of the District in verification of this statement, and that relying upon these statements respondent purchased the said property.

Aa motion was made by the petitioners for judgment notwithstanding the return, which was refused, the court being of the opinion that certiorari was not the proper remedy under the facts stated.

ARGUMENT.

I.

On the Merits.

The decision on the question involved in this case turns upon the *fact* whether the parcel of ground in question was or was not a cemetery at the time the water main was laid. It is admitted by defendant that if it was a cemetery at that time the said assessment was and is void.

The contention of the defendant is that, while the said land had been used for a cemetery for a number of years, in 1887 the petitioner not only indicated an intention to abandon said land as a cemetery, but did commit acts and make admissions of such a character as to lead any right-thinking person to conclude that the said land had been abandoned as a cemetery.

Abandonment is a question of intent. Intent is ordinarily proved by acts (Merchants' Nat. Bank *v.* Greenhood, 41 Pac., 266; 16 Mont., 395).

Abandonment includes both the intention to abandon and the external act by which the intention was carried into effect, and, as intention is the essence of abandonment, the facts of each particular case are for the jury (Tenn. & C. R. Co. *v.* Taylor, 102 Ala., 224; Bartley *v.* Phillips, 165

Pa., 325). It is a question of intention, and not of lapse of time, which latter is only significant in connection with other circumstances for the purpose of ascertaining intention (Moore *v.* Rollins, 36 Cal., 333).

The facts as disclosed by the return in this case, which must be taken as true (D. C. *v.* Brooke, 29 App. D. C., 563), are that in the year 1887 the Commissioners of the District of Columbia, at the request of the petitioner, passed an order forbidding further interments of human bodies in said parcel of ground; that the petitioner thereupon advertised in several newspapers in this District for a period of about six months, notifying persons having friends and relatives buried in said cemetery to remove said bodies because the said parcel of ground *had been abandoned* as a cemetery, and that in consequence thereof about 400 bodies were removed; that the said property became and was for sale to any one who would make a satisfactory offer. These are the facts of this case up to December, 1894, when the said water main was laid. In January, 1895, the Commissioners, or proper District officials charged with the duty under the law, found as a *matter of fact* that the said cemetery had been abandoned, and concluded that the land was liable to assessment for said water main, and so notified said petitioner.

It is submitted that, taking the expressed intention of petitioner in connection with the enumerated acts committed by it, the District authorities were justified in concluding the said cemetery to be abandoned and in levying said tax.

As tending further to strengthen the position of the municipal authorities—their conclusion that said cemetery was abandoned—we find that the cemetery for many years had remained unfenced. In 1908, when the District was negotiating for the purchase of said land, and it thought perhaps some question might be raised as to the removal of the remaining bodies, under section 675 of the Code, the petitioner insisted that said cemetery had been abandoned, and

had been since 1887, when said order was passed by the Commissioners.

It is fair to presume that the bodies remaining in said cemetery at the time of the District's contemplated purchase were left there after the petitioner's said advertised notice to remove the same, above mentioned, because either it was not seen by relatives or friends of said parties, or that such parties had no relatives or friends living, or they were indifferent or too poor, if living. It must be remembered that this cemetery was a very old burying ground, and it was natural that some bodies would have to be removed by the cemetery or public authorities, after so many years elapsing after burial, when the cemetery should be abandoned. So far as the petitioner was concerned, however, after said advertisement, it took no further interest in the bodies and made no effort to protect, preserve, or care for the same or the graves; it even allowed the fence to decay or be carried away.

Another principle of law that applies to the merits of this case is that of estoppel. When the District authorities proposed to buy this parcel of ground petitioner's officers again insisted that the cemetery had been abandoned. It was this subsequent declaration, together with the known attitude of petitioner, that satisfied the District that it would have no trouble in reference to said bodies. If the cemetery had been abandoned at the time of the proposed sale, it was also abandoned from the date of said order and advertisement to date of said sale, because of the continuous acts and declarations of petitioner. The property was bought by the District, and is now used as a public playground.

"Where one tacitly encourages an act he cannot afterwards exercise his legal right in opposition to such consent, if his acts induced a change of position by the other party, who would be pecuniarily prejudiced by assertion of adversary claim" (Swain *v.* Seamens, 9 Wall., 254, 274).

The following cases, among others, stated in Rose's notes, vol. 7, p. 174, sustain this principle: Truesdail *v.* Ward, 24 Mich., 221, holding vendee estopped from claiming equities after apparent acquiescence in forfeiture for non-payment; Beatty *v.* Sweeney, 26 Mich., 221, compelling owner inducing purchaser to buy from another as holding legal title to release to vendee; Calhoun Co. *v.* American Emigrant Co., 93 U. S., 130, holding county estopped from assessing taxes on land which it had claimed title to; Lumber Co. *v.* Klamath River, etc., Co., 96 Fed., 54, holding lessor estopped from forfeiting lease for breach of terms by acquiescence.

If one person is induced to do an act prejudicial to himself, in consequence of the acts or declarations of another, on which he has a right to rely, equity will enjoin the latter from asserting his legal rights against the tenor of such acts or declarations.

Branson *v.* Wirth, 17 Wall., 32.

He who, by his language or conduct, leads another to do what he would not have otherwise done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.

Dickerson *v.* Colgrove, 100 U. S., 578.

It is submitted that the above principles are applicable because the petitioner sold the cemetery to the respondent, and the latter bought upon the representation that the cemetery had been abandoned; and now that the sale has been completed, it seeks to be heard in the statement that it is not a cemetery, and was not at the time of the sale and prior.

If a party by waiver has misled his antagonist, if he refrained from making objections known to him, at a time when they might have been removed, and until after the possibility of such removal has ceased, he ought not to be permitted to raise the objections at all.

Shutte *v.* Thompson, 15 Wall., 151.

A party cannot be permitted to claim under and against the same deed.

Gibson *v.* Lyon, 115 U. S., 439.

Where a party has given his reason for his conduct, he cannot, after litigation begun, change his ground.

R. R. *v.* McCarthy, 96 U. S., 258.

If a contract stipulates for possession by the vendee or the vendor puts him in possession, he holds as licensee, and the vendee and his assignee are estopped from denying the title of the vendor.

Burnett *v.* Caldwell, 9 Wall., 290.

Query.—Would the *vendor* be heard to say that the title was not good? *Nemo allegans suam turpitam audiendum est.* It is submitted that the petitioner cannot blow hot and cold in this case. It has sold the property to the District on the representation that the cemetery was abandoned, and now seriously asks the court to declare the cemetery not abandoned. This is asking the court to participate in the perpetration of a fraud.

II.

On the Procedure.

(*a.*)

Certiorari is not the proper remedy. The petitioner should have brought his action of assumpsit or debt.

It is plain that the end to be attained by the petitioner was the recovery of the money deposited with the District of Columbia, which represented the amount of the water-main assessment. The simple way to do this would be an action of assumpsit for money had and received, alleging the refusal to pay, although the assessment was illegal. The court could then determine whether the assessment was valid or not, assuming for the moment that there was no agreement

between the parties that the Commissioners should determine that question.

In the present proceeding, if the petitioner should prevail, there would be no disposition of the fund in the hands of the District and no judgment against the District for a money recovery. The petitioner would be compelled to sue the District for the recovery of the money unjustly exacted from it, which was what he should have done in the first instance without resorting to his remedy by certiorari. "Certiorari is not to be regarded in the light of an action, but rather as a remedy" (Harris on Certiorari, p. 6). Certiorari is, obviously, not the proper method to recover money paid for an illegal tax.

The proper office of the writ of certiorari is to review merely errors of law apparent on the record, and the writ will not lie, as a general rule, to review questions of fact (IV Enc. Pl. & Pr., 47, and cases).

In the case of Walsh *v.* Macfarland (Law, No. 47689, Supreme Court, D. C.), Mr. Justice Barnard decided that certiorari would not lie to review the action of the Police Trial Board in finding petitioner guilty of conduct unbecoming a police officer. The court said: "I doubt the power of the court, however, to weigh the testimony in a proceeding before the Trial Board where there is any competent evidence for the consideration of that tribunal."

Where the question presented is whether a subordinate tribunal has erred in some matter of fact submitted to its judgment, its action cannot be revised by certiorari.

Hayward, petitioner, 10 Pick. (Mass.), 358.
Frankford *v.* Waldo Co., 40 Mo., 391.
Chicago, etc., R. Co. *v.* Whipple, 22 Ill., 105.

It is the general rule that the weight or sufficiency of the evidence as to the facts upon which the determination below was based will not be considered, if there was any evidence to support the findings (6 Cyc., 824).

Barber *v.* Harris, 6 Mackey, 586.

It is submitted that the question before the District authorities for consideration was largely one of fact, to wit, whether the cemetery had been abandoned at the time of the assessment, and acting on the acts committed by petitioner and the admissions made by it, set up in the answer, they concluded that, as a matter of fact, it had been abandoned. This was not done without having evidence before them, and it is respectfully submitted that under the authorities above quoted (and many more which can be given) their finding is not reviewable by this honorable court by certiorari.

The numerous cases cited by counsel for petitioner depend upon some jurisdictional requirement of the law to give validity to the tax. That is, some necessary prerequisite of the statute giving authority to levy the tax has not been met. In this case, upon the levy of the assessment the statutory requirements as to notice to the petitioner were complied with, as shown by the answer, and no objection was raised as to the assessment until the sale to the District.

The District authorities have full jurisdiction in reference to levying taxes under the authority conferred by Congress. Under such laws various exemptions are allowed, such as to churches, schools, religious societies, etc., and they are constantly deciding matters of fact as to whether a given institution is a church or a religious society, educational institution or a charity.

Certiorari is not a writ of right, but one to be issued in the discretion of the court, and then only for the purpose of effecting substantial justice.

Dist. of Col. *v.* Brooke, 29 App. D. C., 563.

The writ of certiorari is generally refused where other remedies exist.

4 Am. & Eng. Enc. Pl. & Pr., 36.

The writ will be refused where other adequate remedies are open to the petitioner.

4 Pl. & Pr., 50.
D. C. *v.* Nau, 20 D. C., 547.
Fowler *v.* Lindsay, 3 Dall., 411.

"According to the peculiar circumstances of the case, the court may also, in its discretion, refuse the writ and leave a party to his remedy by action."

4 Pl. & Pr., 73.

The writ will not lie to review assessments for local improvements.

Matter of 18th St., 16 Abb. Pr., 169.

Proceedings in the taking of land for school purposes cannot be reviewed by certiorari.

Hooper *v.* Bridgewater, 102 Mass., 512.

(*b.*)

The court has authority to quash the writ and dismiss the petition, though return has been made thereto.

The Court of Appeals, in Padgett *v.* D. C. (17 App. D. C., at p. 263), said:

"It would seem to be well settled that the court may, upon motion, or even *suo motu,* whenever it becomes advised that the writ has been improperly issued, quash the writ and dismiss the petition. This may be done in the exercise of sound discretion."

Flourney *v.* Payne, 28 Ark., 87.
Ex parte Pearce, 44 Ark., 40.
State *v.* Browning, 27 N. J. Law, 527.
State *v.* Newark, 30 N. J. Law, 303.

As was said by the court in the case of State *v.* Jersey Water Co., 30 N. J. Law, 247:

"The allowance of the common law writ being discretionary, the court, if at any time in the progress of the case it discovers facts which, on the application for the writ, would have defeated it, will dismiss it on its own motion."

It is respectfully submitted that the judgment should be affirmed and the petitioner left to his ordinary remedy at law to recover this money if, under the facts of this case, he is so entitled.

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